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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 293

HICKEY & COMPANY, A Partnership Composed of William L. Hickey, Louis W. Hickey and Justin D. O'Brien, as Partners and Individually,

Petitioners

VERSUS

UNITED STATES OF AMERICA and ROBERT P. PATTERSON, Secretary of War, *Respondents*

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT OF PETITION

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PETITION FOR WRIT OF CERTIORARI

May it Please the Court:

The petition of Hickey & Company respectfully shows to this Court:

A

SUMMARY STATEMENT OF THE MATTER INVOLVED

One Maurice Hirsch, purporting to act under the authority of the Secretary of War, on April 12, 1946 made a so-called "unilateral determination" that in the year 1942 Petitioners received "excessive profits" on contracts with the United States War Department in the sum of $80,000.00 (R. 4-5-6). The Secretary of War sued the Petitioners to recover such amount in the United States District Court for the Northern District of Texas (R. 1), and recovered judgment in that amount (R. 77). Petitioners appealed to the Circuit Court of Appeals for the Fifth Circuit; the judgment was affirmed on June 25, 1948 (R. 85) without written opinion other than the citation of the decisions of this Court rendered on June 14, 1948, in the case of Jacob Lichter and others.

B

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. No act of Congress, either expressly or by implication, authorizes or authorized a unilateral determination of excessive profits from contracts completed in the year 1942. The Circuit Court of Appeals should have so held and reversed the case.

This is an important question of Federal law which has not been, but should be settled by this Court. It also involves the construction and application of a Federal Statute, which has not been, but should be settled by this Court.

2. The act of Congress permitting renegotiation of contracts, in so far as applicable to contracts completed in the year 1942, the year here involved, expressly forbade the commencement of such renegotiation after one year from the expiration of the contractor's fiscal year in which such contract was completed. No renegotiation was begun in the instant case prior to the year 1946. The Circuit Court of Appeals should have so held and reversed the judgment of the trial court.

This is an important question of Federal law which has not been, but should be settled by this Court, and involves the construction and application of a Federal Statute, which has not been but should be settled by this Court.

WHEREFORE, your Petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Fifth Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record, and all proceedings in the case numbered and entitled on its docket, No. 12031, Hickey & Company, a Partnership Composed of William L. Hickey, Louis W. Hickey and Justin D. O'Brien, as

Partners and Individually, Appellants, vs. United States of America and Robert P. Patterson, Secretary of War, Appellees, and that the said judgment of the said Circuit Court of Appeals may be reversed by this Honorable Court and that your Petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your Petitioners will ever pray.

HICKEY & COMPANY, A Partnership Composed of William L. Hickey, Louis W. Hickey and Justin D. O'Brien, as Partners and Individually

By.....

ALLEN WIGHT, Counsel for Petitioners

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Supreme Court of the United States

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UNITED STATES OF AMERICA and ROBERT P. PATTERSON, Secretary of War, *Respondents*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I

THE OPINIONS OF THE COURT BELOW

The opinion of the Court below is reported at 168 Federal Reporter, 2nd Series, page 752, and may be found at page 85 of the Record herein.

II

JURISDICTION

1. The statutory provision believed to sustain jurisdiction is Section 240 of the Judicial Code as amended by the Act of February 13, 1925, as it appears in Title 28, Section 347 (a) of the United States Code Annotated.

2. The date of the judgment to be reviewed is June 25, 1948 (R. 87). Petition for rehearing was filed on July 14, 1948 (R. 88) and overruled on July 26, 1948 (R. 90).

3. The nature of the case and the rulings below were such as to bring the case within the jurisdictional provisions relied upon, in that it is a civil case in a Circuit Court of Appeals, in which the Court affirmed (R. 87) an ordinary money judgment (R. 77) based upon an attempted unilateral determination by the Secretary of War of the receipt of excess profits by the Petitioners from contracts with the Secretary of War. The defenses offered involved questions of the construction and application of Federal statutes authorizing renegotiation of such contracts, the Defendants' contentions in the trial court, re-

jected by that court and the Circuit Court of Appeals, being that:

(a) The original renegotiation act set out in Appendix A hereto, the only statute applicable to the contract involved, as amended by the Revenue Act of 1942, effective October 21, 1942, set out as Exhibit B hereto, did not authorize a unilateral determination of excess profits by the Secretary of War, in the event renegotiation did not procure the assent of the contractor to his money demands upon the contractor. (Eleventh Defense, R. 11)

(b) The original act, as amended by the Revenue Act of 1942, effective October 21, 1942, affirmatively forbade any attempt on the part of the Secretary to institute renegotiation in 1946 on contracts begun and completed in 1942. (Fourteenth and Fifteenth Defenses, R. 12)

4. Cases believed to sustain the jurisdiction of this Court to grant the writ are: *Lau Ow Bew vs. United States*, 144 U. S. 47; *Otis & Company vs. Securities & Exchange Commission*, 323 U. S. 624.

III

STATEMENT OF THE CASE

Petitioners, a firm composed of William L. Hickey, Louis W. Hickey and Justin D. O'Brien, entered into a contract with the Quartermaster Corps of the War Department for the construction of warehouses in Fort Worth, Texas at a price of $897,103.05 (R. 16).

The contract was awarded as a result of competitive bidding (R. 16).

The bid of Hickey & Company was submitted on April 29, 1942 in conformity with advertisement for bids dated April 22, 1942 (R. 16).

This contract was the only contract relative to which the Secretary of War claimed a right of renegotiation (R. 16).

The contract required final completion by September 1, 1942 (R. 17).

On April 12, 1946, one Maurice Hirsch, claiming to act under the authority of the Secretary of War, attempted to make a unilateral determination of excessive profits arising from the contract, in the amount of $80,000.00 (R. 4-6).

This "determination" was that the profits were realized during the fiscal year ended December 31, 1942 (R. 6).

No appeal was taken to the Tax Court from this finding.

Suit was filed against the Petitioners by the Secretary of War to cover the amount so determined (R. 1-4).

Judgment was rendered in his favor for said amount, less tax credit, plus interest, on February 21, 1947.

Petitioners appealed to the Circuit Court of Appeals for the Fifth Circuit. Judgment of the trial court was affirmed on June 25, 1948.

Prior to the first day of January, 1944, the following communications were had by the Petitioners from the

Secretary of War or someone claiming to act under his authority, and none other:

On June 30, 1943 a letter on War Department stationery from A. J. Hammond (R. 25), advising that Hickey & Company had been assigned to the Dallas office "for handling" and requesting Hickey & Company to furnish that office such information as it might request (R. 25).

On July 6, 1943, a letter from the War Department Dallas office advising of the assignment to the Dallas office "the renegotiation of contracts performed by the Government by your firm *that are subject* to the Renegotiation Act," and that in order to determine the proper renegotiation procedure to be followed by it, "it is necessary for this office to obtain certain *preliminary information*, a form PAS-SWD-1 being enclosed for completion." (R. 26)

This letter was accompanied by a copy of a Joint Statement by the War, Navy & Treasury Departments and Maritime Commission, dated March 31, 1943 (R. 70), which read in part as follows:

> "(a) Renegotiation of individual contracts.—No renegotiation of the contract price pursuant to any provision therefor, or otherwise, shall be commenced by the Secretary more than one year after the close of the fiscal year of the contract or subcontract, as determined by the Secretary occurs. (See subsection (c) (6).) The Departments interpret this provision to mean that *renegotiation commences on the specific*

date set by the Department conducting renegotiation for the initial renegotiation conference unless otherwise agreed by the contractor."

On July 21, 1943, the Dallas office again requested the completion of PAS-SWD-1, warning that upon non-compliance subject would be reported to the Board "for proper action by the Under Secretary of War." (R. 31).

On August 24, 1943, a letter from the Dallas office, adding to the list of agencies whose contracts had been made subject to renegotiation and requesting the listing of any such other contracts on PAS-SWD Form No. 2, which was enclosed (R. 32).

There were no other written communications, but on September 7, 1943, one Colonel Boyd called from Washington requesting that "certain information requested" by the Dallas office be furnished it (R. 18) and other 'phone calls were received from personnel of the Dallas office on July 15, and December 14, 1943, requesting that the same information requested in the letter be furnished (R. 19).

Well after the last written communication was addressed to Hickey & Company by the War Department, Mr. Woodward, Chairman of the Dallas office of the Price Adjustment Board, (R. 57) called the concern and advised them (R. 58)

"All we have asked for is information as to what contracts you have," and again,

"the whole thing . . . is wholly preliminary and voluntary," and again,

> "it is not impossible that preliminary conversation to which I refer will develop the fact that there is nothing whatever to renegotiate."

IV

SPECIFICATION OF ERRORS

1. The Circuit Court of Appeals erred in not reversing and rendering the judgment of the trial court, in that said judgment was based upon an attempted unilateral determination by the Secretary of War of excessive profits from a contract completed in the year 1942, there being no act of Congress which, either expressly or by implication, authorizes or authorized such unilateral determination.

2. The Circuit Court of Appeals erred in not reversing and rendering the judgment of the trial court, in that the suit was based upon an attempted unilateral determination by the Secretary of War of excessive profits received by the Petitioners from a contract executed and completed in the year 1942, without there being any evidence that renegotiation of such contract was begun or attempted to be begun within one year after the expiration of the contractor's fiscal year in which such profits were alleged to have been earned, as required by the law applicable thereto.

V

ARGUMENT

SUMMARY OF ARGUMENT

POINT A

The original renegotiation law contemplated revision of contract prices only upon assent of the contractor.

POINT B.

Such act was not intended to be applied to construction contracts let on advertisement and bid, but only to negotiated contracts.

POINT C.

Such act was merely an administrative direction to the heads of the Departments, lacking in features which would necessarily have been incorporated if substantive rights were to be subjected to its effect.

POINT D.

The language of the act applicable does not reasonably permit a construction, giving to the Secretaries the power unilaterally to determine the merits of claims asserted by them against contractors.

POINT E.

Under the terms of the original act and the amendment applicable, the attempted renegotiation was instituted too late.

POINT F.

The so-called "renegotiation" involved being unauthorized by law, and having been instituted at a date when the institution thereof was prohibited by law, no rights arose thereunder which will be enforced by any court, regardless of any failure of the contractor to seek relief through administrative channels.

STATUTES INVOLVED

The original renegotiation statute was contained in Section 403 of the Sixth Supplemental National Defense Appropriation Act of 1942, effective April 28, 1942, and is set out as Appendix A hereto.

It was amended in some particulars by Section 801 of the Revenue Act of 1942, effective October 21, 1942, this section being set out as Appendix B hereto.

There was a general overhauling of the statute by the Revenue Act of 1943, effective February 25, 1944, for which reason it may sometimes be referred to as the Act of 1944. This is not copied as an appendix for the reason

that it has no direct bearing on the controversy, which involves a 1942 contract, to which, by its terms, it is not applicable, in that in general it is made applicable only to contracts for fiscal years ending after June 30, 1943, and the Petitioners reported on a calendar-year basis.

POINT A

The original renegotiation law contemplated revision of contract prices only upon assent of the contractor.

The outward character of the original Act is inferable from the following language used in the Commerce Clearing House service covering "Government Contracts," with reference to the Act:

> "The procurement agencies proposed that contractors be required to furnish adequate data on actual costs and profits, after experience in production, and, in the light of such data, to *bargain* in good *faith* for adjustment of the contract price.

and, approaching the statute with out any preconceptions as to its effect, any interested citizen would also place a similar interpretation on the language used, we believe.

This interpretation, like the interpretation of the term "collective bargaining" used in other familiar statutes would assume participation by the contractor in "renegotiation" and render his consent necessary to any price adjustment, just as the term "collective bargaining" does

not impose any duty to acceed to the demands of the union bargaining agent.

Such interpretation is the antithesis of the interpretation here asserted, which denies to the contractor any participation in the renegotiation except as a matter of grace. The claim is here made that if a contractor declines to accept any adjustment proposed by a Secretary, he may be compelled so to do.

This is stating the government position rather harshly, but courtesy offered can not obscure the ruthlessness of such an interpretation of this law. Nor can ruthlessness be avoided if such an interpretation be allowable.

The law was absolutely silent as to any standards by which the administrator should act. No authority was given them to establish standards. Some members of Congress had interpreted the word "excessive" as equivalent of "fraud." Others had suggested that the word meant "unconscionable." But the administrators were left to their own devices. If uniformity was even to be sought and favoritism and partiality to be minimized, some rules had to be adopted, and so some one or some group, whose names are still a secret, worked up a formula by which the law should be applied. Rightly or wrongly the contents of such directives were "restricted," that is to say they were kept secret from the victim. (See the testimony of the Secretary of War before the Ways & Means Committee, September 21, 1943, Pages 844-5.) He was thus

left facing the end product of an anonymous formula, the factors of which were unknown to him, applied to evidence not disclosed to him, with the option of taking it or being "backed into a buzz-saw," thus reducing his participation in "renegotiation" to the right to squawk. We repeat that this is the necessary and proper end of the interpretation of the Act claimed by the plaintiff if the interpretation is correct.

The prime question in this case is, is such an interpretation correct? And the trial court seems to have overlooked this issue.

We find it wholly unnecessary to attack the original renegotiation Act of 1942 or its amendment of that year, as set out in the Appendix hereto, as either unconstitutional, or even to criticize it as an improper exercise of a war power of Congress.

The complaint herein is of the construction given to it by the Administrative officials charged with its applcation.

Now, as above stated, this Act, in its inception was "a price adjustment Act designed to lower costs" of munitions of war. And even though it is demonstrable with mathematical certainty that an attempt to control "prices" by scaling "profits" down to a level, can only result in an ultimate increase of costs, Congress approached the matter from such an angle and passed this law, which in its essence required the head of any department involved,

"whenever in his opinion, excessive profits have been realized or are likely to be realized" from a contract, to require that the contractor "renegotiate" the contract price and if it should be found "*as a result of renegotiation*" that such *price* was "excessive," to recover the excess paid to the contractor, if he had already been paid, or refix the contract price in the case of contracts not then fully performed.

The Act was an obscure rider tacked on to the end of an appropriation bill on April 28, 1942, and naturally the provisions were known only to those administrative officers who procured its passage.

Now, it happens that on April 29th, the following day, the defendants here submitted a bid on the work involved in this suit. (R. 16) The bid was a result of a prior advertisement, covered construction work of a conventional character (two warehouses) and on May 2, (R. 16) they being the low bidder, were given the contract. That is to say, they were given this contract for the simple reason that no other concern was willing to take the work and assume the hazards at the price which the defendants offered to do it. They proceeded in the faith that, having bid on the basis of an advertisement by the United States government, they could tend their promise in full confidence that our government would fulfill its commitment if given. It was given. The contract submitted to them was silent on the subject of renegotiation, though this rider

had been injected into the statute law at the instance of the party they were contracting with. The fact that by sheer fiction they are also presumed to know the law does not suffice to prevent the present attempt to unilaterally refix the contract price, from being an attempt to take away from hem a part of the funds then expressly promised to them, or destroy the taint of repudiation to be accomplished in this fashion.

We make these observations at this time so that this Court may know that we have no apology to make for the firm refusal of the defendants to submit, by word or gesture, to the claim subsequently made by the War Department that it had a legal right, unilaterally to revoke its own promise.

POINT B.

Such act was not intended to be applied to construction contracts let on advertisement and bid, but only to negotiated contracts.

At this point we would capitalize the fact that this contract was for

(a) construction work, and was

(b) let on advertisement and bid.

We do this for the reason that such contracts are not in any respect comparable to the "negotiated" contracts by which munitions were procured by the departments, either

from a practical standpoint or a legal standpoint, and any "excess" in a price paid on such contracts must be determined by different means. In addition, the very words "renegotiate," as used in the statute, mean something when applied to a "negotiated" contract and are meaningless when applied to such contracts as the one in question.

Nor is this a technical quibble. The whole history of the law proves that the law was devised for an entirely different class of contracts.

We quote from the "Joint Statement" above-mentioned, the attempted justification of the Act:

> "*First—War materiel contracts,* which have been generally profitable sometimes are excessively so because many war industries have had to be created under forced draft. In many cases profits have been unpredictable because the production of repetitive items has increased by geometric proportions. Therefore, the accumulation of excessive profits by some war contractors has been and always will be unavoidable. These excessive profits are extremely irregular. They accrue to some contractors, not to others. Taxation, which must apply equally to all war and civilian businesses, cannot keep pace with the erratic development of excessive war profits.
>
> "*Second—War industries* lack the normal competitive incentive for low-cost, efficient operation. The Government, in many instances must buy from every available source of supply, regardless of cost. Neither taxation nor any proposed profit limitation formula

restores this incentive. In fact, taxation and most limitation formulas put a premium on high costs.

"*Third—The munitions industry* is extremely varied. A large part of it operated with Government capital or Government guarantees, substantially reducting private risks. Some contractors can continue their peacetime processes with little change. Others must attempt unfamiliar and unexplored operation. Some operations permit a very rapid turn-over of the contractor's investment, others a very slow turn-over. No formula for limiting profits can deal equitably with all these circumstances.

In fact, we do not believe that in all the literature relative to this subject with which others, as well as the departments involved, flooded this country, can there be found a reference to profits from construction work let on advertisement and bids, as being either a reason for the law or as needing correction.

We think that we can also safely say that it was well up in 1943 before the departments began to claim publicly that such contracts were subject to revision. At least it was many moons after the law went into effect before any attempt was made to require renegotiation as to any such contracts.

And certainly it is clear that Congress was surprised at any claim of such authority. And why? Because it had only passed a law permitting an excessive "price" to be the subject matter of renegotiation. And in what conceivable way can it be determined after a construc-

tion contract is completed that the low bidder at the bidding table, where the price is determined, was asking an "excessive" price? Does a *price* become excessive because the contractor has successfully passed the hazards of

(a) bad weather,

(b) delays in delivery of materials,

(c) increase in prices,

(d) strikes,

(e) unreasonable inspectors,

(f) Friday night "blackout," as required by the contract, (R. 69)

(g) penalties for working two shifts, as provided by the contract, (R. 69)

(h) speed up orders, requiring ten (10) hour shifts seven days in the week, with a 100% increase in payroll, (with only 20% increase in output), as provided by the contract, (R. 69) and

(i) possible penalties of $1800.00 per day for delay in completion, (R. 68)

And by putting rhythm into the labor force and streamlining the flow of material, on this one occasion may have netted 20% of the contract price when others (or their sureties) who got fouled on the hazards in question (on similar jobs) lost 50% of the contract price?

Can we assume that Congress did not know these things? We think not. At least when it came to their knowledge that these department officials were claiming the power and wisdom necessary for such a purpose, it was a matter of sharp inquiry on the part of the Members. We quote from the Hearing before the Ways and Means Committee, September 9-23, 1943:

Representative Dingell speaking:

> "I do not believe that we ever had that (competitive contracts) in mind at the time we considered or voted on the question of renegotiation." (Page 865).

We also quote from this report: The witness Rockey, Chairman of the Price Adjustment Board of the Navy Department, being on the stand, the following colloquy occurred between him and Representative Gearhart:

"*Mr. Gearhart:* What percentage of the contracts are on a competitive basis?

Mr. Rockey: I do not know the exact percentage, but I should say a very, very small percentage at the present time.

Mr. Gearhart: Nearly all of the contracts are on a negotiated basis?

Mr. Rockey: Yes sir.

Mr. Gearhart: Therefore the argument which was suggested by the General who was at Mr. Karker's side yesterday is not of great importance in connection with ne-

gotiated contracts. It might be of importance in its relation to the very, very few competitive contracts. That is the situation, is it not?" (Pages 173 and 174).

Karker, Chairman of the War Department Price Adjustment Board was questioned with regard to the matter by Mr. Lynch, Page 82 and 83, and we quote:

"*Mr. Lynch*: Do you draw any distinction between losses sustained on a contract where there has been competitive bidding, and a contract which just has been negotiated by the Government?" (Page 82).

After some exchange, Mr. Karker replied:

"Of course, the proportion of competitive bidding today is practically nil * * * in times of free and open and effective competition there should be no renegotiation." (Page 83).

And again when Secretary of Commerce Jones was on the stand in colloquy with Mr. Gearhart, relative to the possible right of a contractor to have renegotiation, the Secretary said:

"I think I stated I thought it ought to work both ways, *assuming that the fellow did not get the contract in competition.*"

On this point Mr. Gearhart remarked:

"And since a very, very insignificant percentage of the contracts are now executed on a competitive basis, under

competitive bidding, it really is not an important consideration." (Pages 198 and 199).

It will be noted that these witnesses did not even attempt to justify their position, but attempted to distract the attention of the Committee by their representation that the number of such contracts was "very, very few." But Congress was not satisfied, and in the overhauling of the statute by the Revenue Act of 1943 (January 1944) the claimed power to "renegotiate" such was not only swept away, but this was made retroactive to the very date of the Act as to construction sub-contracts, and back far enough to eliminate prime contracts, reportable in any fiscal year beginning after June 30, 1942. In fact, the report of the Committee clearly indicates that only by a clerical error (or some department draftsmen's cleverness) were any of such contracts saved from complete elimination. It will be noted in a 1944 Act, there is a provision for the elimination of certain classes of contracts from renegotiation. This is Section (i) (1). This paragraph is divided into sub-paragraphs "A" to "F", inclusive. Section "E" eliminates any contract with a Department awarded as a result of competitive bidding for the construction of any building, structure, improvement or facility, while sub-section "F" eliminated any sub-contract directly or indirectly under a contract or sub-contract to which this section does not apply by reason of this paragraph.

In the effective date provisions, sub-paragraphs (i) (D) and (i) (1) (F) were made effective as of the date of the original Act, but by some accident (or maneuver), section (i) (1) (E) was not dated back to the enactment of the original Act. That it was not the intention of Congress that this be so omitted appears from a report of the Ways and Means Committee, recommending the passage of the Act. It appears from this report that what was intended was to make both contracts for construction let on advertisement and bid, and sub-contracts thereunder, exempt from renegotiation. We quote the following from Page 79 of the Committee report:

> "Under existing law, considerable confusion results from the fact that a sub-contract may be subject to renegotiation even though the prime contract or any intermediate sub-contract may not be so subject. The bill exempts such sub-contracts as are directly or indirectly under an exempt contract or sub-contract."

But applying the language of the Act literally, all sub-contracts for construction work were eliminated from renegotiation, but prime contracts were eliminated only in the event the contractor's fiscal year began after June 30, 1942.

Unfortunately for defendants, they happened to be on a calendar year basis with the Treasury Department, and completed the contract in question within the year 1942, and by reason of this fortuitous circumstance, the re-

negotiation of their contract price does not come within the express prohibitions of the 1944 Act.

But Congress did, by this provision of the 1943 Act, expressly determine and declare the impropriety of a claim of a right to determine retrospectively the proper value to be placed on the prospective assumption of the unknown hazards of loss on a contract for construction let on advertisement and bid.

POINT C.

Such act was merely an administrative direction to the heads of the Departments, lacking in features which would necessarily have been incorporated if substantive rights were to be subjected to its effect.

But let us assume that Congress did determine originally (but mistakenly, as admitted by the excluding amendment) that such contracts were appropriate for renegotiation, and intended to leave it to the administrator to find some basis for evaluating hazards and to confer on them the legislative power to fashion standards (or do without them), by which these things could be revalued retrospectively, the large question remains as to whether Congress intended, by the original Act or the amendment of 1942 to authorize anything other than a "re-negotiation". That is to say—

Did these acts provide, or even attempt to provide, that in the event renegotiation should fail to produce the de-

sired results, the Secretary might "unilaterally determine" the existence and amount of excessive profits?

An examination of the acts will reveal that no such powers are expressly given. The Act on its face constitutes an administrative directive to the Department Heads involved. It does not attempt to create or destroy rights of either department or individual. So construed, it is a valid statute appropriate to the purpose for which designed, and the absence of legislative standards is unimportant. If construed as an attempt to alter or determine existing contractual rights, immediate difficulty is encountered.

By the Act of 1943, an attempt is made to do these things. The very length of the Act, however, points up the differences between an administrative directive, such as the two Acts of 1942, and a statute which attempts to regulate substantive rights of Government and citizen, and to provide appropriate machinery for their adjudication We repeat, however, that this Act is not applicable to the instant case. We wish it were, for the reason that, by its terms, contracts such as the one here involved are *not* subject to renegotiation, much less "unilateral determination." We mention this for the second time so as to emphasize the necessity of scrutinizing the two applicable Acts for Congressional intent, without drawing inferences from subsequent legislation on the same subject. It is peculiarly inappropriate to do so when we remember that these are departmental inspired statutes.

It is also pertinent to say here, that the tremendous effort to get this particular power sanctified by Congress is pretty good evidence of doubts about its existence prior to 1944.

Now, did such power so exist theretofore? As pointed out, no such power is expressly given. It must be claimed, if at all, as an implied power. Now an implied power means a power intended by Congress (and not by some ingenious bureau draftsman), and such an intent must be reasonably inferrable from the language used. It does not mean a bureaucrat's intent or desire, or some court's idea of what would have been appropriate to the declared (or undeclared) purpose. This is sometimes recognized by the bureaucrats themselves. Even the National Labor Relations Board in a recent case (Lewis Motor Co., April 24, 1947) held that even if the result was desirable, the Act creating it did not give it the power to hold the Act applicable merely because "protection ought to be given."

Let us see then if an intent can be even imputed to Congress, much less inferred from the language of the Act, to put such arbitrary and extreme power in the hands of a functionary? If the Act be construed as an administrative directive to incorporate in all future contracts a power for renegotiation, and to seek renegotiation in all contracts not then fully paid, all of the provisions became harmonious, and none of them outrage justice or established practice or arouse questions of constitutionality.

If, on the other hand, it had been intended to give the Secretary of War the power, four years later, to unilaterally reduce the amount of the bid which defendants made, (the bid automatically becoming the contract price, as a matter of law, at the moment it was accepted).

(a) would it have made the Act operative instantly, as it did, when to do so would make it operative as a fraud on contractors submitting bids without knowledge of it or opportunity for knowledge,

(b) would it have made it apply to contracts theretofore let, when to do so would operate to repudiate the public debt,

(c) would it have omitted to set its standards or even to put in motion machinery by which such standards might be set up, by which excessiveness of profits might be determined, when such an omission would leave the Act too indefinite for enforcement, or would commit both a legislative and judicial function to the executive, and

(d) would it have omitted making provision for hearing, process and the attendance of witnesses, which are the fundamentals required for due process, and

(e) would it have permitted one party to a justiceable controversy to sit in judgment in the matter with or without a provision for appeal, when to do so would seem to violate the first canon of due process?

Please note that we are not here insisting that the renegotiation law is invalid under any of these principles. We would not have this Court assume, however, that we accept as correct the holdings of the Court in the Lichter case, and the other cases decided at the same time. We must perforce submit to the views of the Court on the questions there presented, but we note particularly our dissent to the holding in those cases that in time of war the property of the citizen may be "conscripted." We believe that the Fifth Amendment to the Constitution of the United States reading,

> "* * * nor shall private property be taken for public use without just compensation,"

is not repealable by an act of Congress, even by a declaration of war.

Our proposition is that neither the original renegotiation act nor the amendments of 1942 will bear a construction which would have such an effect.

POINT D.

The language of the act applicable does not reasonably permit a construction, giving to the Secretaries the power unilaterally to determine the merits of claims asserted by them against contractors.

But let us suppose there is no such thing as a constitution or constitutional principles, and take a look at these

statutes for the purpose of ascertaining whether such an intent should be inferred from the language used.

As the Act construed as claimed would be grossly in derogation of common law principles, it would seem that the claimed construction should not be given unless required by its terms. As this can not be contended, we assume that it may be claimed that certain language in the Act would be meaningless except on the assumption of an intent to give such power. But as our search discloses no such language, we assume that it will be contended that

(a) the Act should be liberally construed, so as to accomplish the apparent social objective,

(b) the powers claimed are needed for the full accomplishment of the purpose, and

(c) there is language, which, when so liberally construed, makes it apparent that Congress, even if it did not grant such powers, intended for the Secretaries to assume them, as an incident to the granted powers.

Now, this approach to the matter runs afoul of some very well settled canons of construction, one of which is that when a statute creates a right and provides a remedy, that remedy is exclusive and all other remedies are denied. (*U. S. ex rel Texas Portland Cement Co. vs. McCord*, 233 U.S. 157) and (*Ex parte Hughes*, 129 S.W. (2) 270).

But the construction anticipated should not be dismissed without careful examination. We understand that the contention is that sub-paragraph "C" of Section 403, the "definition" section of the act, which reads as follows:

> "and the terms 'renegotiate' and 'renegotiation' include the refixing by the Secretary of the Department of the contract price,"

impliedly authorizes the assumption of the power claimed to unilaterally fix such prices if "renegotiation" fails to procure the contractor's assent.

Now, please note that this is in the definitive section of the act, and not in any section attempting to create powers. But if it were elsewhere, it would still be a mere statement of an obvious fact, just as a statement that "a trial *includes* the entry of judgment" or "marriage *includes* the consummation thereof", or "collective bargaining *includes* the drafting of the agreement". It could not be contended that the entry of judgment would *constitute* a trial or that consummation *constituted* marriage, or the mere drafting by one party of an agreement *constituted* collective bargaining.

Furthermore, when we get to the body of the enactment, we find that the power to refix the price is "upon renegotiation" so to do. (App. Page 10, line 10) So it is clear that this is not an independent power, but one incidental and auxiliary to the preceding renegotiation and absolutely dependent upon it.

Not only that, the Act does not provide for any independent method of arriving at the amount of the excess profits. The amended Act even defines the excessive profits as meant in the Act in the following language:

> "The term 'excessive profits' means *any amount of* a contract or sub-contract price, which is found *as a result of renegotiation*, to represent excessive profits." See Appendix, Page 9.

There seems to be a vague theory floating around that by implication, or otherwise, Congress provided for the recovery of "unreasonable" profits, and that there is some vague standard of reasonableness by which an administrative officer might be guided, and that the provision for reasonable profits is sufficiently certain and definite for application, but it will be noted that the Act does *not* provide for recapture of the profits which are unreasonable in amount. It merely provides for the elimination of such profits as are found "upon renegotiation" To be excessive.

Therefore, if the Act provides for a *unilateral* determination, it results in the absurdity that the determination must be in an amount determined bilaterally, and the Act would read, "The Secretary may unilaterally refix the contract prices to eliminate excessive profits to the extent determined bilaterally". Or if refixing *is* renegotiation, then the statute would be inoperative entirely as certainly refixing must wait upon "renegotiation," while such an

interpretation would prevent the existence of renegotiation before refixing.

But we need not multiply words, we think. The word "renegotiate" has a simple, ordinary meaning. The fiat of one of the parties to the negotiation cannot constitute renegotiation. If the word "renegotiate" was meant in any other sense than the simple and obvious one, it was a "weasel word" and an intent so to use words ought not to be imputed to Congress, nor can it be so done in the light of their own declaration contained in the Committee Report that the word "renegotiation" was given a new definition by the Act of 1944. We quote the language of the Report of the Committee, as found on Page 83:

> "Renegotiate" and "renegotiation."—These terms are given *new* definition in the bill and mean the determination by agreement *or order* of the amount of profits considered to be excessive. In other words, the terms indicate (as is set forth in detail in late sections of the bill) that *a determination may be by way of a bilateral agreement* between the Government and the contractor, or in case of such an agreement cannot be reached, a unilateral determination of the amount of excessive profits may be made by order."

Thus, we find from the most authoritative source that can be obtained, a formal declaration excluding the possibility that, prior to the 1944 Act the word "renegotiate" included anything more than determination by agreement of the existence and amount of excess profits.

And so far as the literature on this subject was made available to the public, we find not even a claim of any other authority under the original Act. It is not to be found in the Joint Statement prepared and given to contractors. The nearest the Department came, as late as 1943, to making such a claim was in the following language:

> "In the event it becomes impossible to reach a settlement agreement the case is then referred to the offical of the department, or to the Commission to whom authority has been delegated under the statute, who gives consideration to the use of such special measures as he may deem necessary and advisable." (Joint Statement—Page 5)

This hardly suggests that any of the Departments had any idea that the Act, as then in effect, gave them the drastic powers now claimed, unrelieved by any of the limitations, qualifications and right of appeal thereafter created.

Even as late as September 9, 1943, one Maurice Karker, Chairman of the War Department Price Adjustment Board and Director of the Renegotiation Division of the Army Service Forces, testifying (?) before the Ways and Means Committee, in an effort to secure amendments to the Act, including this power of unilateral determination, attempted to justify this demand for more power in the following language:

> "In my judgment as an individual, it is a dangerous and un-American statute, but we are in a dangerous

and destructive war, which justifies unusual precautions." (Report of Hearings, page 2)

Mr. Karker got his "dangerous and un-American" law, but he got it by the act passed in 1944, which, by its terms, is not applicable to this case. He got it by a "new" definition of the word "renegotiation," a definition perverting the ordinary meaning, a definition declared to be new by the report of the Committee itself, which we have set out above.

We do not recite these things because the "new definition" is applicable in this proceeding. It is not. We recite them as evidence of the fact that, avid of power as is a bureaucrat, and liberal as he is in construing his grant of authority, none of them, prior to the amendment of 1944, had ever dared to claim officially a right to refix contract prices unilaterally, and were, in fact, by seeking such authority, admitting the want of it.

Even Secretary Patterson was constrained to admit the want of it in his testimony before the Committee. We quote his language shown in the report of the hearing of the Ways and Means Committee, September 9-23, 1943, at page 843:

"MR. PATTERSON: I do not think the conclusion of the Secretary of War, of his determination, is final, complete and conclusive. It is, so far as immediate action is concerned, but it is not binding on the contractor if he wants to take it into court, unless he has consented. Of course, if they enter into an agreement, that is different."

and again on page 844:

> "The answer to your direct question, Mr. Disney is that the determination of the Secretary, I believe, is not final or binding or conclusive, unless the contractor assents to it."

We believe that this Court referred to the original act as "crude." We think the crudity developed only when an attempt was made to convert it to a use for which it was not designed. An axe is a crude tool with which to shave.

The truth of the matter is that the idea of unlimited profits being wrung from a helpless government in its hour of travail which only the claimed power could prevent, was largely without warrant.

By the Selective Service and Training Act the President had been authorized to force contracts on any unwilling contractor for munitions by seizure of the plants, if necessary (Title 50, App. 309, U.S.C.A.). Naturally, the price offered to such manufacturers in the beginning was sufficient to avoid the question of confiscation. Naturally, as these manufacturers familiarized themselves with the new product and streamlined their processes enormous profits might develop. But the Government was not in a helpless condition by any means. As the Court probably knows, all such contracts carry provisions for cancellation for the convenience of the Government. (If any Department omitted such a provision, it, and not the law, even as it

then stood, is to blame.) At any time unusual profits developed, the Department could cancel the contract, and relet it to the *same concern* at a proper price as redetermined in the light of experience and no issue of confiscation could thereafter be raised.

On top of this was the 80 per cent tax.

Nevertheless, as we are reliably informed, there were some cases where unconscionable profits had actually developed, which the concerns involved were perfectly willing to refund, if the refund could be deductd for income tax purpose. Mr. Anderson, then a member of the Ways and Means Committee, later Secretary of Agriculture, is reported as stating that this rider was attached to this supplemental appropriation act in order to validate income tax deductions based on refunds arising from voluntary renegotiation proceedings then pending and such as might thereafter become desirable. For such purposes, and as an administrative directive, it was an appropriate and valid statute. It was only when it was attempted to be used to the regulation limitation and destruction of contractual rights that the "crudity" developed.

We are therefore completely satisfied that the statute applicable in this case did exactly what it purported to do; that it gave the Secretaries the power to renegotiate for refunds and to negotiate for a refixing of contract prices, in lieu of a cancelling and reletting in the case of incom-

plete contracts. This was naturally and properly made applicable to all contracts not then complete.

It is believed that any other interpretation outrages the language of the Act.

POINT E.

Under the terms of the original act and the amendment applicable, the attempted renegotiation was instituted too late.

This contention does not raise an issue of limitation but one of jurisdiction. We submit that the attempted renegotiation was as nugatory as if it had been attempted by Judge Patterson after he had been removed from office.

The statute applicable, as amended in 1942, says:

> "No renegotiation of the contract price, pursuant to any provision therefor, or otherwise, shall be commenced by the Secretary more than one year after the close of the fiscal year of the contractor, or subcontractor, within which completion or termination of the contract, or sub-contract, as determined by the Secretary occurs."

The renegotiation relied upon related to a 1942 contract but was not had until 1946.

We have always understood that these special tribunals exercising judicial or quasi-judicial power were subject to the rule laid down in *Galpin vs. Page*, 85 U. S. 350:

> "But where the special powers conferred are exercised in a special manner not according to the course of the common law, or where the general powers of the court are exercised over a class not within its ordinary jurisdiction upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the judgment of the court. The facts essential to the exercise of the special jurisdiction must appear in such cases on the record."

If we are correct in our understanding, then we have a record which wholly fails to show "facts essential to the exercise of the special jurisdiction," in that it was not made to appear that the statute authorized a unilateral determination, or that within the time alloted to him the Secretary instituted the renegotiation proceedings.

The Court will have in mind that the Act contemplated that renegotiation be required only "whenever, in the opinion of the Secretary," excessive profits had been or would be realized. It necessarily follows that for the purpose of the formation of any kind of opinion on the subject, the Secretary would have to ascertain the number of contracts held by any particular contractor, the amounts thereof, and the cost of performance.

With these inescapable facts in mind, we now refer the Court to the facts relative to this aspect of the case as set out in our Statement of the Case. It will be observed that every communication was merely a request for information as to number of contracts and amounts invol-

ved; that repeatedly Petitioners were advised that this did not constitute the beginning of renegotiation; that such an inquiry was not in fact and could not reasonably be considered as the beginning of renegotiation and the regulations then in effect, as well as the subsequent statutes substantially adopting such regulations correctly recognize this.

The situation is identical with that presented to the Tax Court in the case of *Sessions vs. United States*, 6 T. C. No. 154. In that case, as in this, the Secretary relied upon his request for preliminary information as starting renegotiation.

The Tax Court describes the letter as follows:

> "The letter, including the signature, was all mimeographed. The first two paragraphs of the letter contained a general statement that Price Adjustments Boards had been established by the War Department and other agencies pursuant to Section 403 of the Renegotiation Act to conduct proceedings with contracting or subcontracting corporations in order to clear those corporations under the Act, and that renegotiation proceedings would be conducted by the department or agency having the predominant interest in the business of the respective corporations. The third paragraph began as follows:
>
> > 'In order that your company and its affiliates, if any may be assigned for renegotiation to the proper Department or Service with the minimum of inconvenience to all concerned, we will be glad to receive any information which you may care to submit bearing upon the matter.'

"It was stated in the remainder of the paragraph that the information should cover the petitioner's estimate of the total dollar amount of its contracts with each of the various Government agencies, similar estimates in regard to sub-contracts, the amount of expansion of facilities furnished by Government agencies, information as to its affiliates, if any and similar information in regard to their contracts and sub-contracts, so that the assignment of all of the companies might be made to the same Department or Service and renegotiation proceedings conducted on a consolidated basis. The next paragraph stated that a suggested outline of reply was enclosed for the petitioner's convenience. The last two paragraphs of the letter were as follows:

> 'The difficulty of giving promplty an exact statement of the matters above mentioned is recognized. Accordingly, it is to be understood that a general estimate with respect to amounts of contracts and sub-contracts will suffice for the immediate purpose. Such information will in any case be received without prejudice to you.
>
> 'The assignment of your company will be deferred for fifteen days following the date of this letter in order that you may have an opportunity to submit the information outlined above.'

"The last paragraph of the outine of reply attached to the letter was as follows:

> 'The foregoing information is based on general estimates only. Its purpose is to indicate to you our view as to how this company and its affiliates should be assigned for renegotiation under Section 403 of Public Law No. 528, as amended, should such renegotiation be required'."

The Tax Court then says of this letter:

"The petitioner contends that the renegotiation which resulted in the unilateral determination here being contested did not commence within the meaning of section 403 (c) (6), *supra*, during the calendar year 1943, but commenced at some time in 1944, at which time the Secretary was barred from commencing renegotiation proceedings for the period here in question. The respondent makes only one contention in opposition, and that is that the renegotiation was commenced within the meaning of section by letter of March 3, 1943. He argues that renegotiation proceedings, as contemplated in the Renegotiation Act, involve three steps—(1) investigation and ascertainment of facts from the contractor, (2) renegotiation and clarification of the facts ascertained, and (3) a determination of the amount of excessive profits and the issuance of the unilateral determination where the parties are unable to agree. He argues that the proceedings in this case commenced when the investigation started and was brought to the attention of the contractor by the letter of March 3, 1943, asking for the submission of information in regard to its contracts. The respondent argues that that letter, which started the machinery in motion, should be recognized as commencing the renegotiation proceedings.

"Subsequent amendments of the law applicable only to later years provided that renegotiation proceedings would commence with a formal notice to the contractor. However, the statute applicable to the period here in question did not specify how the proceeding would commence. The Joint Statement of March 31, 1943, referred to above, contained a statement that

renegotiation commences on the 'date set by the department conducting renegotiation for the initial renegotiation conference.' The respondent argues that that was an erroneous interpretation and was later corrected by a provision in a manual wihch stated 'that renegotiation commences at the time the machinery of renegotiation is put in motion and an initial contract made with the contractor, either in in person or through the mails, for the purpose of obtaining information which is to be used as a basis for the determination of excessive profits.' The petitioner replies that the manual was 'restricted' to Government personnel engaged in renegotiation. So far as the record shows, it was not even in existence during the calendar year 1943. Even if we assume for the purpose of discussion that the quoted interpretation was a proper one, still it would not help the respondent in this case because no contact was made with the petitioner, either in person or through the mails during 1943 'for the purpose of obtaining information which is to be used as a basis for the determination of excessive profits.'

"Section 403 (c) (1) authorized and directed the Secretary 'to require the contractor or sub-contractor to renegotiate the contract price.' It is seen from this and from other provisions of the law that the contractor is to be a party to the renegotiation. Indeed one of the chief purposes of the renegotiation is to bring both parties into agreement under the repricing and the amount of excessive profits under the former contract price to be returned to the Government. The renegotiating agencies of the Government have consistenly recognized that an actual renegotiation does not commence until the contractor is at

least notified that he is to join in the proceeding in some way. For examply, that he is to come to a conference or is to furnish information in regard to his renegotiable business which will reveal whether or not he has realized excessive profits and the extent thereof. Although Congress did not specify how a renegotiation should commence under the 1942 amendment, nevertheless, it must have intended that a Secretary should give a contractor some fair, unequivocal, and unmistakable notice of the Secretary's intention to commence a renegotiation. It could not commence until the Secretary had done somthing to indicate to a reasonably intelligent contractor that it was to commence at that point. Not every communication from a Secretary to a contractor in which the subject or renegotiation might be mentioned would serve this purpose. A communication of that kind might be for another purpose, and a communication obviously intended for another purpose would not serve to commence a renegotiation.

"The letter of March 3, 1943, upon which the respondent relies, was not sent for the purpose of commencing renegotiation proceedings. It was not sent for the purpose of bringing about an initial conference or to obtain information to be used as the basis for determination of excessive profits. It was carefully written and its purpose is obvious. It sought some very limited information for assignment purposes only. It asked not for facts but for estimates only. It said that the Price Adjustment Board would 'be glad to receive' such information as the petitioner might care to submit. It explained that the information furnished would in no case prejudice the petitioner, and the form enclosed indicated that no de-

cision had yet been reached as to whether renegotiation would or would not be required. Not even estimates were requested as to costs and other information whoch would obviously be necessary in any renegotiation proceeding. The letter contains no suggestion that the Secretary is thereby requiring the petitioner to renegotiate the contract price of any of its contracts or sub-contracts. Later communications required the petitioner to submit information to be used as a basis for the determination of excessive profits for 1942, but those communications were made in 1944 and not in 1943. Therefore, they were too late under the statute. It is not necessary in this case to determine exactly when the renegotiation in question did commence. It obviously commenced at some time in 1944, but it is sufficient for present purposes to hold that it did not commence in 1943."

It is believed that no closer parallel with the facts in the case at bar can be imagined.

If the above reflects the correct rules, the Secretary of War had lost the power to even institute the proceedings, upon which this suit and judgment are solely based, at the time such proceedings were had.

POINT F.

The so-called "renegotiation" involved being unauthorized by law, and having been instituted at a date when the institution thereof was prohibited by law, no rights arose thereunder which will be enforced by any court, regardless of any failure of the contractor to seek relief through administrative channels.

As we do not have the benefit of an expression of the views of the Circuit Court of Appeals on the questions involved in this case, or any exposition of their finding that this case is controlled by the holdings of this Court in the Lichter and companion cases, we are compelled to assume that it deduced from that opinion that this Court would hold that not even a total lack of power in the Secretary of War to hand down the decree sued upon, would impair this right to enforce his void order, in the absence of a showing of an exhaustion of administrative sources of relief therefrom.

We do not believe this Court intended to so hold.

Our contentions relate to the *power* of the Secretary of War. They attack his *jurisdiction* to render the judgment or determination in question. It is our view that if he lacks *power* to make the determination, his purported determination was VOID. We know that this would be the rule applicable to an act of a court attempting to render a judgment if it had no power to do so.

Time was when the particular function attempted to be exercised by the Secretary would have been held to be judicial in character and beyond even the power of Congress to confer upon him. And in the courts of this country, it is still recognized that a party cannot, as a court, sit in judgment upon his own case, or determine his own jurisdiction to sit in such a case. So far as we know,

the fact that an administrative officer is the person exercising a quasi-judicial function has not impaired these principles. We still assume that these things are principles and not merely artifical, technical rules applicable only to the judiciary.

We understand full well that we are attempting a collateral attack on the decree of an administrative officer in a quasi-judicial proceeding. We are well aware of the fact that in the case of ordinary judicial proceedings, such an attack can be based only upon a lack of jurisdiction to render the particular judgment. In this case we are attacking that jurisdiction, although, under ordinary rules, as reflected in the decisions of the Supreme Court of the United States, this being a special proceeding, it is not necessary for us to show want of jurisdiction. On the contrary, the burden is upon the person claiming a right thereunder, not only to establish jurisdiction, but to establish the regularity of every step taken in the proceeding. So we undestand from *Galpin vs. Page*, 85 U. S. 350:

> "But where the special powers conferred are exercised in a special manner not according to the course of the common law, or where the general powers of the court are exercised over a class not within its ordinary jurisdiction upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the judgment of the court. The facts essential to the exercise of the special jurisdiction must appear in such cases on the record."

We also understand from *U. S. Ex Rel Texas Portland Cement Company vs. McCord*, 233 U. S. 157, reading in part as follows:

> "The statute thus creates a new liablity and gives a special remedy for it, and upon well-settled principles of the limitations upon such liability, became a part of the right conferred, and compliance with them is made essential to the assertion and benefit of the liability itself."

So far as we know the above cases still reflect the rule applicable to judicial proceedings. The only visible escape from the effect of rules would seem to rest upon some super-sanctity of administrative ruling, giving them a character and validity above and beyond the holding of the courts operating under the Judicial Department of our Government as created by the Constitution.

We do not see how this Court or any other court could concede this, nor does any authority known to us support such a proposition. See 42 Am. Jur. 517, reading as follows:

> "It is generally said that like the judgment of a court, an administrative decision made by an agency action in a judicial or quasi-judicial capacity is open to collateral attack on the ground that the decision is invalid and void for lack of jurisdiction over the person or over the subject matter, or because the determination attacked was not the act of the body vested with power to make the determination."

We would again call to the attention of the Court the fact that we do not here assail the constitutionality of the statutes in question, however strongly we may feel that they invade the prohibitions of that fundamental document. We are not here questioning the power of Congress to confer these admittedly drastic powers upon the Secretary of War. We are asserting that Congress, by the Act under consideration, which, under every criterion of construction must be strictly construed, did not confer that power upon the Secretary, even if the Act be given a liberal construction. We have asserted, and still assert, that the Secretary of War, admitting before the Ways and Means Committee that he did not have the requisite power, sought to acquire it, but was expressly denied it so far as this particular contract is concerned. Not having such power, he could not delegate it to Maurice Hirsch, nor did he attempt so to do, if we read the record correctly.

Can it be the rule that any officer of the Government may assume any power he may think he should have to "conscript" the property of citizens and thereupon he or any subordinate may compel the citizens of this country to explore and exhaust all means of administrative relief from such "conscription" before being allowed *to defend* themselves in the duly constituted courts from an affirmative attempt of that administrative officer to effectuate the "conscription", which is not only not authorized but expressly forbidden?

If Secretary of War Patterson, as he admitted, had no power to hand down his decree, his act in doing so was as empty and nugatory as if he were any private citizen. It was *power* he lacked, just as it is power that the writer of this brief lacks to render such a decree.

If the writer of this brief, instead of Maurice Hirsch, had attempted to exercise such a power in the name of the Secretary, could judgment have been rendered thereon by the court below merely because Hickey and Company did not appeal to the Tax Court for relief? Obviously not, because the writer lacked the *power* under the law to make the determination. But he was no more lacking in power than was Maurice Hirsch, whose only advantage was that he could do what he did on Government time and on Government stationery. Lacking power, his act was void. His act being void, it could furnish no basis for recovery.

This is inescapable unless a new meaning is to be given to the word "void" or unless this Court intends to establish the rule in this country that any fiat of any person clad in Government livery and claiming to act under lawful authority, however lacking therein, must be enforced by the courts of this country, unless the victim shall have successfully located, explored and exhausted every obscure and doubtful source of relief vouchsafed to him as matter of right by the law, or as a matter of grace by the official hierarchy.

If this be the situation, then indeed can it be said that the judiciary has become but the handmaiden of the executive, helpless to protect the citizen from its usurpations, and the citizen has become the helpless slave of ten thousand petty tyrants presiding over their respective island empires, and we shall henceforth have a government of men and not of laws.

CONCLUSION

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the erroneous judgment of affirmance by the Circuit Court of Appeals may be set aside and the judgment of the trial court be reversed and that to such an end a writ of certiorari should be granted and this Court should review the decision of the Circuit Court of Appeals and finally reverse it.

.....

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Section 403 of Sixth Supplemental National Defense Appropriation Act 1942

Sec. 403. (a) For the purposes of this section, the term "Department" means the War Department, the Navy Department, and the Maritime Commission, respectively; in the case of the Maritime Commission, the term "Secretary" means the Chairman of such Commission; and the terms "renegotiate" and "renegotiation" include the refixing by the Secretary of the Department of the contract price. For the purposes of subsections (d) and (e) of this section, the term "contract" includes a subcontract and the term "contractor" includes a subcontractor.

(b) The Secretary of each Department is authorized and directed to insert in any contract for an amount in excess of $100,000 hereafter made by such Department (1) a provision for the renegotiation of the contract price at a period or periods when, in the judgment of the Secretary, the profits can be determined with reasonable certainty; (2) a provision for the retention by the United States or the repayment to the United States of (A) any amount of the contract price which is found as a result of such renegotiation to represent excessive profits and (B) an amount of the contract price equal to the amount of the reduction in the contract price of any subcontract under such contract pursuant to the renegotiation of such subcontract as provided in clause (3) of this subsection; and (3) a provision requiring the contractor to insert in each subcontract for an amount in excess of $100,000 made by him under such contract (A) a provision for the renegotiation

by such Secretary and the subcontractor of the contract price of the subcontract at a period or periods when, in the judgment of the Secretary, the profits can be determined with reasonable certainty, (B) a provision for the retention by the United States or the repayment to the United States of any amount of the contract price of the subcontract which is found as a result of such renegotiation, to represent excessive profits, and (C) a provision for relieving the contractor from any liability to the subcontractor on account of any amount so retained by or repaid to the United States.

(c) The Secretary of each Department is authorized and directed, *whenever in his opinion excessive profits have been realized*, or are likely to be realized, from any contract with such Department or from any subcontract thereunder, (1) to require the contractor or subcontractor to renegotiate the contract price, (2) to withhold from the contractor or subcontractor any amount of the contract price which is found as a result of such renegotiation to represent excessive profits, and (3) in case any amount of the contract price found as a result of such renegotiation to represent excessive profits shall have been paid to the contractor or subcontractor, to recover such amount from such contractor or subcontractor. Such contractor or subcontractor shall be deemed to be indebted to the United States for any amount which such Secretary is authorized to recover from such contractor or subcontractor under this subsection,

and such Secretary may bring actions in the appropriate courts of the United States to recover such amount on behalf of the United States. All amounts recovered under this subsection shall be covered into the Treasury as miscellaneous receipts. This subsection shall be applicable to all contracts and subcontracts hereafter made and to all contracts and subcontracts heretofore made, whether or not such contracts or subcontracts contain a renegotiation or recapture clause, provided that final payment pursuant to such contract or subcontract has not been made prior to the date of enactment of this Act.

(d) In renegotiating a contract price or determining excessive profits for the purposes of this section, the Secretaries of the respective Departments shall not make any allowance for any salaries, bonuses, or other compensation paid by a contractor to its officers or employees in excess of a reasonable amount, nor shall they make allowance for any excessive reserves set up by the contractor or for any costs incurred by the contractor which are excessive and unreasonable. For the purpose of ascertaining whether such unreasonable compensation has been or is being paid, or whether such excessive reserves have been or are being set up, or whether any excessive and unreasonable costs have been or are being incurred, each such Secretary shall have the same powers with respect to any such contractor that an agency designated by the President to exercise the powers conferred by title XIII of the Second War Powers Act, 1942, has

title is vbgkqj vbgkqj vbgkqj cmfwyp shrdlu shrdlu with respect to any contractor to whom such title is applicable. In the interest of economy and the avoidance of duplication of inspection and audit, the services of the Bureau of Internal Revenue shall, upon request of each such Secretary and the approval of the Secretary of the Treasury, be made available to the extent determined by the Secretary of the Treasury, for the purposes of making examinations and determinations with despect to profits under this section.

(e) In addition to the powers conferred by existing law, the Secretary of each Department shall have the right to demand of any contractor who holds contracts with respect to which the provisions of this section are applicable in an aggregate amount in excess of $100,000, statements of actual costs of production and such other financial statements at such times and in such form and detail as such secretary may require. Any person who wilfully fails or refuses to furnish any statement required of him under this subsection, or who knowingly furnishes any such statement containing information which is false or misleading in any material respect, shall, upon conviction thereof, be punished by a fine of not more than $10,000 or imprisonment for not more than two years, or both. The powers conferred by this subsection shall be exercised in the case of any contractor by the Secrteary of the Department holding the largest amount of such contracts with such contractor, or

by such Secretary as may be mutually agreed to by the Secretaries concerned.

(f) The authority and discretion herein conferred upon the Secretary of each Department, in accordance with regulations prescribed by the President for the protection of the interests of the Government, may be delegated, in whole or in part, by him to such individuals or agencies in such Department as he may designate, and he may authorize such individuals or agencies to make further delegations of such authority and discretion.

(g) If any provision of this section or the application thereof to any person or circumstances is held invalid, the remainder of the section and the application of such provision to other persons or circumstances shall not be affected thereby.

(h) This section shall remain in force during the continuance of the present war and for three years after the termination of the war, but no court proceedings brought under this section shall abate by reason of the termination of the provisions of this section.

Sec. 801, Revenue Act of 1942

SEC. 801 RENEGOTIATION OF WAR CONTRACTS.

(a) Subsections (a), (b), and (c) of section 403 of the Sixth Supplemental National Defense Appropriation Act (Public 528, 77th Cong., 2d Sess.), are amended to read as follows:

"Sec. 403. "(a) For the purposes of this section—

"(1) The term 'Department' means the War Department, the Navy Department, the Treasury Department, and the Maritime Commission, respectively.

"(2) In the case of the Maritime Commission, the term 'Secretary' means the Chairman of such Commission.

"(3) The terms 'renegotiate' and 'renegotiation' include the refixing by the Secretary of the Department of the contract price.

"(4) *The term 'excessive profits' means any amount* of a contract or subcontract price which is *found as a result of renegotiation to represent excessive profits.*

"(5) The term 'subcontract' means any purchase order or agreement to perform all or any part of the work, or to make or furnish any article, required for the performance of another contract or subcontract. The term 'article' includes any material, part, assembly, machinery, equipment or other personal property.

"For the purposes of subsection (d) and (e) of this section, the term 'contract' includes a subcontract and the term 'contractor' includes a subcontractor.

"(b) Subject to subsection (i), the Secretary of each Department is authorized and directed to insert in any contract for an amount in excess of $100,000 hereafter made by such Department—

"(1) a provision for the renegotiation of the contract price at a period or periods when, in the judgment of the Secretary, the profits can be determined with reasonable certainty;

"(2) a provision for the retention by the United States from amounts otherwise due the contractor, or for the repayment by him to the United States, if paid to him, of any excessive profits not eliminated through reductions in the contract price, or otherwise, as the Secretary may direct;

"(3) a provision requiring the contractor to insert in each subcontract for an amount in excess of $100,000 made by him under such contract (i) a provision for the renegotiation by such Secretary and the subcontractor of the contract price of the subcontract at a period or periods when, in the judgment of the Secretary, the profits can be determined with reasonable certainty, (ii) a provision for the retention by the contractor for the United States of the amount of any deduction in the contract price of any subcontract pursuant to its renegotiation hereunder, or for the repayment by the subcontractor to the United States of any excessive profits from such subcontract paid to him and not eliminated through reductions in the contract price or otherwise, as the Secretary may direct, and (iii) a provision for releiving the contractor from any liability to the subcontractor on account of any amount so retained by the contractor or repaid by the subcontractor to the United States, and (iv) in the discretion of the Secre-

tary, a provision requiring any subcontractor to insert in any subcontract made by him under such subcontract, provisions corresponding to those of subparagraphs (3) and (4) of this subsection (b); and

"(4) a provision for the retention by the United States from amounts otherwise due the contractor, or for repayment by him to the United States, as the Secretary may direct, of the amount of any reduction in the contract price of any subcontract under such contract, which the contractor is directed, pursuant to clause (3) of this subsection, to withold from payments otherwise due the subcontractor and actually unpaid at the time the contractor receives such direction.

"The provision for the renegotiation of the contract price, in the discretion of the Secretary, (i) may fix the period or periods when or within which renegotiations shall be had; and (ii) if in the opinion of the Secretary the provisions of the contract or subcontract are otherwise adequate to prevent excessive profits, may provide that renegotiation shall apply only to a portion of the contract or subcontract or shall not apply to performance during a specified period or periods and may also provide that the contract price in effect during any such period or periods shall not be subject to renegotiation.

"(c) (1) Whenever, *in the opinion of the Secretary of a Department*, the profits realized or likely to be realized from any contract with such Department, or from any subcontract thereunder whether

or not made by the contractor, may be excessive, *the Secretary is authorized and directed to require the contractor or subcontractor to renegotiate the contract price.* When the contractor or subcontractor holds two or more contracts or subcontracts the Secretary in his discretion, may renegotiate to eliminate excessive profits on some or all of such contracts and subcontracts as a group without separately renegotiating the contract price of each contract or subcontract.

"(2) *Upon renegotiations,* the Secretary is authorized and directed to eliminate any excessive profits under such contract or subcontract (i) by reductions in the contract price of the contract or subcontract, or by other revision in its terms; or (ii) by withholding, from amounts otherwise due to the contractor or subcontractor, any amount of such excessive profits; or (iii) by directing a contractor to withhold for the account of the United States, from amounts otherwise due to the subcontractor, any amount of such excessive profits under the subcontract; or (iv) by recovery from the contractor or subcontractor, through repayment, credit or suit, of any amount of such excessive profits actually paid to him; or (v) by any combination of these methods, as the Secretary deems desirable. The Secretary may bring actions on behalf of the United States in the appropriate courts of the United States to recover from such contractor or subcontractr, any amount of such excessive profits actually paid to him and not witheld or eliminated by some other method under this subsec-

tion. The surety under a contract or subcontract shall not be liable for the repayment of any excessive profits thereon. All money recovered by way of repayment or suit under this subsection shall be covered into the Treasury as miscellaneous receipts.

"(3) In determining the excessiveness of profits realized or likely to be realized from any contract or subcontract, the Secretary shall recognize the properly applicable exclusions and deductions of the character which the contractor or subcontractor is allowed under Chapter 1 and Chapter 2E of the Internal Revenue Code. In determining the amount of any excessive profits to be eliminated hereunder the Secretary shall allow the contractor or subcontractor credit for Federal income and excess profits taxes as provided in section 3806 of the Internal Revenue Code.

"(4) *Upon renegotiation* pursuant to this section, the Secretary may make such final or other agreements with a contractor or subcontractor for the elimination of excessive profits and for the discharge of any liability for excessive profits under this section, as the Secretary deems desirable. Such agreements may cover such past and future period or periods, may apply to such contract or contracts of the contractor or subcontractor, and may contain such terms and conditions, as the Secretary deems advisable. Any such agreement shall be final and conclusive according to its terms; and except upon a showing of fraud or malfeasance or a wilful misrepresentation of a material fact, (i) such agreement shall not be reopened as to

the matters agreed upon, and shall not be modified by any offficer, employee, or agent of the United States; and (ii) such agreement and any determination made in accordance therewith shall not be annulled, modified, set aside or disregarded in any suit, action, or proceeding.

"(5) Any contractor or subcontractor who holds contracts or subcontracts, to which the provision of this section are applicable, amy file with the Secretaries of all the Departments concerned statements of actual costs of production and such other financial statements for any prior fiscal year or years of such contractor or subcontractor, in such form and detail, as the Secretaries shall prescribe by joint regulation. Within one year after the filing of such statements, or within such shorter period as may be prescribed by such joint regulation, the Secretary of a Department may give the contractor or subcontractor written notice, in form and manner to be prescribed in such joint regulation, that the Secretary is of the opinion that the profits realized from some or all of such contracts or subcontracts may be excessive, and fixing a date and place for an initial conference to be held within sixty days thereafter. If such notice is not given and renegotiation commenced by the Secretary within such sixty days the contractor or subcontractor shall not thereafther be required to renegotiate to eliminate excessive profits realized from any such contract or subcontract during such fiscal year or years and any liabilities of the contractor or

subcontractor for excessive profits realized during such period shall be thereby discharged.

"(6) This subsection (c) shall be applicable to all contracts and subcontracts hereafter made and to all contracts and subcontracts heretofere made, whether or not such contracts or subcontracts contain a renegotiation or recapture clause, unless (i) final payment pursuant to such contract or subcontract was made prior to April 28, 1942, or (ii) the contract or subcontract provides otherwise pursuant to subsection (b) or (i), or is exempted under subsection (i), of this section 403, or (iii) the aggregate sales by the contractor or subcontractor, and by all persons under the control of or controlling or under common control with the contractor or subcontractor under contracts with the Departments and subcontracts thereunder do not exceed, or in the opinion of the Secretary concerned will not exceed, $100,000 for the fiscal year of such contractor or subcontractor.

"No renegotiation of the contract price pursuant to any provision therefor, or otherwise, shall be commenced by the Secretary more than one year after the close of the fiscal year of the contractor or subcontractor within which completion or termination of the contract or subcontract, as determined by the Secretary, occurs."

(b) Subsection (f) of Section 403 of the Sixth Supplemental National Defense Appropriation Act (Public 528, 77th Cong., 2d Sess.), is amended to read as follows:

"(f) Subject to any regulations which the President may prescribe for the protection of the interests of the Government, the authority and discretion herein conferred upon the Secretary of each Department may be delegated in whole or in part by him to such individuals or agencies as he may designate in his Department, or any other Department with the consent of the Secretary of that Department, and he may authorize such individuals or agencies to make further delegations of such authority and discretion."

(c) Section 403 of the Sixth Supplemental National Defense Appropriation Act (Public 528, 77th Cong., 2d Sess.), is amended by adding at the end thereof the following subsections:

"(i) (1) The provisions of this section shall not apply to—

"(i) any contract by a Depaurtment with any other department, bureau, agency, or governmental corporation of the United States or with any territory, possession, or State or any agency thereof or with any foreign government or any agency therof; or

"(ii) any contract or subcontract for the product of a mine, oil or gas well, or other mineral or natural deposit, or timber, which has not been processed, refined, or treated beyond the first form or state suitable for industrial use; and the Secretaries are authorized by joint regulation, to define, interpret, and apply this exemption.

"(2) The Secretary of a Department is authorized, in his discretion, to exempt from some or all

of the provisions of this section—

"(i) any contract or subcontract to be performed outside of the territorial limits of the continental United States or in Alaska;

"(ii) any contracts or subcontracts under which in the opinion of the Secretary, the profits can be determined with reasonable certainty when the contract price is established, such as certain classes of agreements for personal services, for the purchase of real property, perishable goods, or commodities the minimuum price for the sale of which has been fixed by a public regulatory body, of leases and license agreements, and of agreements where the period of performance under such contract or subcontract will not be in excess of thirty days; and

"(iii) a portion of any contract or subcontract or performance thereunder during a specified period or periods, if in the opinion of the Secretary, the provisions of the contract are otherwise adequate to prevent excessive profits."

The Secretary may so exempt contracts and subcontracts both individually and general classes or types.

"(j) Nothing in sections 109 and 113 of the Criminal Code (U. S. C., title 18, secs. 198 and 203) or in section 190 of the Revised Statutes (U. S. C., title 5, sec. 99) shall be deemed to prevent any person appointed by the Secretary of a Department for intermittent and temporary employment in such Department, from acting as counsel, agent, or attorney for prosecuting any claim against the United States:

Provided, That such person shall not prosecute any claim against the United States (1) which arises from any matter directly connected with which such person is employed, or (2) during the period such person is engaged in intermittent and temporary employment in a Department."

(d) The amendments made by this section shall be effective as of April 28, 1942.